No. 76-1369

In the Supreme Court of the United States

OCTOBER TERM, 1976

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1369

PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks an injunction against the United States from levying upon its property, and a declaration that certain income tax assessments for 1951-1956 are invalid. The district court dismissed the suit on the ground of *res judicata* and the court of appeals affirmed.

In previous proceedings begun in 1972, petitioner brought suit against the District Director of Internal Revenue with respect to the same income taxes for 1951-1955, and related penalties and interest. *Pennsylvania Transfer Co. of Phila., Inc.* v. *Whinston*, 337 F. Supp. 122 (E.D. Pa.), affirmed, 474 F. 2d 1339 (C.A. 3), certiorari denied, 414 U.S. 832. In the prior action, petitioner argued that it did not owe the taxes, that its waivers of the statute of limitations were void, that a threatened levy by the

Internal Revenue Service would irreparably injure it, and that any attempted collections by the Internal Revenue Service would be illegal (R. 31a, 34a-41a).[1]

Petitioner makes virtually the same assertions and requests essentially the same relief in this action which it brought in 1975 (R. 4a-7a, 39a-40a). In the 1972 proceeding, the district court held that petitioner had failed to establish that its waiver of the statute of limitations was void, and had therefore failed to demonstrate that under no circumstances would the government prevail on the merits of its claim. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7. The court accordingly held that petitioner's suit was barred by the Anti-Injunction Act, 68A Stat. 876, 26 U.S.C. 7421(a), which prohibits actions to enjoin the assessment or collection of taxes (337 F. Supp. 122).

On the prior appeal, petitioner failed to challenge the district court's determination that the Anti-Injunction Act foreclosed its suit; the court of appeals affirmed the district court's ruling that petitioner's waivers of the statute of limitations were valid, and thus let the assessments stand (474 F. 2d 1339). In this proceeding, the district court likewise dismissed petitioner's complaint because it "failed to overcome the barrier of §7421(a)" and for the further reason that it was "an apparent attempt to relitigate a cause of action earlier dismissed by this Court [so that] the principle of *res judicata* is applicable" (Pet. A2).

The courts below correctly held that *res judicata* bars this suit because it involves the same tax assessments for the same taxable years, the same parties,[2] and the same basic

[1]"R." refers to the record appendix filed in the court of appeals.

[2]The 1972 suit, although ostensibly against the District Director, was, by statutory mandate, actually against the United States. See 26 U.S.C. 7422(c).

relief as the 1972 suit. *Commissioner* v. *Sunnen*, 333 U.S. 591. Petitioner may not litigate the same cause of action again merely by setting forth new allegations.[3] Under the principle of *res judicata*, a party is bound by a final judgment on a cause of action " 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 597, quoting from *Cromwell* v. *County of Sac*, 94 U.S. 351, 352.

The 1972 judgment conclusively determined that the facts asserted by the petitioner were insufficient to enjoin the levies which have since occurred. The fact that the levies were made after the 1972 litigation is irrelevant. The levies were the natural consequence of the earlier judgment.

It is immaterial that petitioner alleges in this second suit that it is not able to sue for a refund. The absence of any forum to litigate its tax liabilities is the result of its failure to file a timely claim for refund within two years after the filing of the waiver, the validity of which it unsuccessfully challenged in the 1972 proceedings. See 26 U.S.C. 6532(a). A taxpayer cannot voluntarily forego bringing a refund suit and thereafter claim he has no adequate remedy at law. See, *e.g.*, *Commissioner* v. *"Americans United," Inc.*, 416 U.S. 752, 762 n. 13; *Graham* v. *duPont*, 262 U.S. 234.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

[3]For example, petitioner now argues (Pet. 12) that an injunction is permitted where the assessment is based on "unproved fraud penalties."